

STATE OF MICHIGAN
COURT OF APPEALS

BERNIE THORNTON,

Plaintiff-Appellant/Cross-Appellee,

v

GINOP CONSTRUCTION, INC.,

Defendant-Appellee/Cross-
Appellant,

and

JIM'S HANDYMAN AND REPAIR SERVICES,
INC., JIM ZWAR, INC., and ST. JOHN
EVANGELICAL LUTHERAN CHURCH,

Defendants-Appellees,

and

ROBIADEK & SONS EXCAVATING, INC.,

Defendant.

UNPUBLISHED

May 5, 2011

No. 290923

Cheboygan Circuit Court

LC No. 04-007373-NO

Before: HOEKSTRA, P.J., and CAVANAGH and BORRELLO, JJ.

HOEKSTRA, P.J. (*dissenting*).

I respectfully dissent. I disagree with the majority's holding that the trial court erred in granting defendant Ginop Construction, Inc.'s motion for directed verdict. In my opinion, plaintiff failed to establish a question of fact regarding causation.

This Court reviews de novo a trial court's decision on a motion for directed verdict. *Sniecinski v Blue Cross & Blue Shield of Mich*, 469 Mich 124, 131; 666 NW2d 186 (2003). It "views the evidence presented up to the time of the motion in the light most favorable to the nonmoving party, grants that party every reasonable inference, and resolves any conflict in the evidence in that party's favor to decide whether a question of fact existed." *Thomas v McGinnis*, 239 Mich App 636, 643-644; 609 NW2d 222 (2000). Only when there is no factual question on which reasonable minds could differ is a directed verdict appropriate. *Id.* at 644. Cause in fact is generally a question for the jury, but if there is no factual dispute, it may be decided by a court.

Genna v Jackson, 286 Mich App 413, 418; 781 NW2d 124 (2009). “A mere possibility of [cause in fact] is not sufficient; and when the matter remains one of pure speculation and conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict in favor of the defendant.” *Id.*

Plaintiff’s theory of causation at trial was that a portion of the six-inch to two-foot wide area between the service drive and the slope collapsed, causing James Lalonde to lose control of the Pettibone, which then slid down the slope and tipped over, injuring plaintiff.¹ Lalonde’s trial testimony was arguably consistent with plaintiff’s theory of causation.² In addition, his testimony was supported by the police report regarding the accident and expert testimony that the compaction of the strip between the service drive and the slope as constructed by defendant was defective. Also before the trial court at the time defendant made its motion for directed verdict were photographs taken at the scene by the state trooper called to investigate the accident.

On appeal, defendant asserts that the photographs eviscerate the probative value of the evidence that supported plaintiff’s theory of causation because the photographs clearly show that the narrow strip in the area where the accident occurred did not collapse. I disagree with the majority’s characterization of the photographs as “inconclusive.” After reviewing the photographs, I conclude that they show that the ground in the six-inch to two-foot wide strip was generally in the same condition as the ground on the slope. However, at the location where the accident occurred, the photographs show that only the ground *on the slope* was displaced by the wheels of the Pettibone. Contrary to plaintiff’s claim, the photographs also show that the ground in the narrow strip where plaintiff maintains the collapse occurred was in the same condition as the ground elsewhere in the strip. Thus, I conclude that the photographs conclusively establish that the ground in the narrow strip between the service drive and the slope did not collapse, and that the Pettibone was on the slope when it lost traction.³ Consequently, I agree with the trial court that defendant was entitled to a directed verdict because the photographs conclusively resolve in defendant’s favor any disagreement in the evidence whether the strip next to the service drive that defendant constructed collapsed. I would affirm.⁴

/s/ Joel P. Hoekstra

¹ Plaintiff was standing on a platform attached to the Pettibone.

² Lalonde’s testimony was not entirely clear whether all four of the Pettibone’s wheels were on the service drive or whether the wheels were on the narrow strip next to the service drive that plaintiff maintains collapsed.

³ Indeed, Lolonde agreed that if the Pettibone got over the “ledge,” he would lose control of it.

⁴ Because I would affirm the trial court’s grant of a directed verdict, I do not address the alternate ground for affirmance regarding duty raised in defendant’s cross-appeal.